IN THE HIGH COJURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO. 7703 OF 2004

Kuwarsingh Lakhasi Shah
since deceased, though his LRs.
Smt. Mangalabai Kurwarnshi Shah ..... Petitioner.

versus

Abdul Mashid Balechand Maner..... Respondent.

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Shr A.M.Kulkarni for the petitioner.
Shri S.S.Patwardhan for the respondent.

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CORAM ; R.M.S. KHANDEPARKAR, J.

DATED; 6TH DECEMBER, 2004.

P.C.;

1. Heard the learned advocates for the parties.

2. The petitioner challenges the concurrent orders passed by the courts below ordering eviction of the petitioner on the ground of bonafide need of the suit premises to the respondent. It is sought to be challenged on two grounds: firstly, the point regarding hardship was itself construed as a ground for eviction on the basis of bonafide need of the premises and the issue pertaining to the bonafide need was not

separately considered at all. Secondly it is challenged on the ground that the courts below failed to comply with its obligation to consider whether partial eviction would satisfy the bonafide need of the respondent-landlord.

3. In that regard, attention was drawn to section 13(2) of the Bombay Rent, Hotel and Lodging House Rates Control Act 1947, (hereinafter called as "the said Act"). Reliance is placed in the decision of the Apex Court in the matter of **Bhagwan Vishwanath Phadnis and others Vs. Bhasker Digamber Choudhary reported in (1997) 4 S.C.C. page 374 and Hiralal Moolchand Doshi Vs. Barot Raman Lal Ranchhoddas and others reported in (1993) 2 S.C.C. page 458** as well as the decision of the learned Single Judge of this Court in **Yashwant Prabhakar Kam,ble Vs. Prasad Narhari Karanikar and others reported in 1998(1) Mh.L.J. page 541.** On the other hand the learned advocate for the respondent, by placing reliance on the decision of the Apex Court in the matter of **Baba Kashinath Bhinge Vs. Samast Lingayat Gavali and others reported in 1994 Supp (3) Supreme page 698,** submitted that the courts below having considered the fact that the petitioner has alternative premises wherein the petitioner has already commenced the business, the question of court

considering the issue regarding partial eviction does not arise at all. Once it is found that the tenant has alternative premises to carry on his business, the question of considering issue of hardship coupled with that of the bonafide need of the landlord by way of partial eviction of the tenant from the premises does not arise at all.

4. As regards the first contention, it is seen that undisputably the respondent-landlord had been carrying on the business of moving cart. He has sought eviction of the premises on the ground that he needs to carry on his business in his own premises which are let out to the petitioner. The said need on the part of the landlord having been established, with other evidence regarding his capacity to carry on such business, certainly it discloses bonafide need of the landlord in relation to his premises and undisputably there is no evidence on record to disclose that the landlord has his any other premises of his own to commence any such business. It is also not the case of the petitioner that the proceedings have been initiated with intention either to dispose of the premises or to let out the premises for higher rent. The contention of the learned advocate for the petitioner that the issue of hardship has been confused with the issue of bonafide

need of the premises is devoid of substance. The hardships which has been suffered by the landlord on the ground of business being carried out on running cart itself establish the greater hardship that would be suffered by the respondent if relief is refused and the same has been considered by the courts below.

5. As regards the second ground of challenge, undisputably the second part of section 13(2) provides that if the Court is satisfied that no hardship would be caused either to the tenant or to the landlord by passing the decree in respect of a part of the premises, the Court shall pass the decree in respect of such part only. Undoubtedly the proviso to the said section requires the court ordering eviction to consider whether the eviction only in respect of a part of the premises would satisfy the requirement. However, to pass any such order there must be material before the court. Though the court is bound to consider the proviso, the court cannot compel the parties to lead evidence on the point. In the absence of any material in that regard there was no occasion for the courts below to order the partial eviction from the suit premises. Being so, the judgment of single Judge is of no help to the petitioner.

6. It is to be noted that as rightly contended by the learned advocate for the respondent the Apex court has held in **Baba Kashinath Bhinge's** case thus:

> "Thus the plan drawn by the District Judge and also the report Exh.17 and above findings would clearly establish that the appellant is having three shops at a distance of 40 feet from the demised premises therein. They are on the main road. He had also inducted one of the tenants to sell essential commodities as fair price shop. On the other hand the influx of pilgrims is so acute that the trust needs the shops and the area for their accommodation. Thus it would be seen that the appellant is having alternative accommodation. The need to pass partial decree is obviated. The appellate court, therefore, was right in its conclusion that there is no hardship caused to the appellant in passing a decree of eviction."

The said decision was sought to be distinguished by contending that the courts below could have passed partial eviction. In the case in hand, it is the contention of the petitioner that no such issue was

considered at all. As already observed, there was no occasion to consider the same in the absence of any material. It is observed by the Apex court that once it is disclosed that the tenant is having alternative accommodation, the question of passing partial decree stands obviated. Considering the same in the facts of the case that once the court below has considered the aspect of hardship suffered by the landlord, coupled with the fact that the petitioner has alternative accommodation, the need to pass partial decree should obviateed in the case in hand also.

7. The decisions of the Apex court in **Hiralal Moolchand Doshi's** case as well as in **Bhagwan Vishwanath Phadnis's** case, are of no assistance to the petitioner. In Hiralal's case attention was sought to be drawn in para 25 of the decision. The same relates to the plea of comparative hardship. It is not on the point as to whether the issue regarding partial decree is to be considered.

8. In Bhagwan's case attention was drawn to paras 4 and 5. It says that if the High court felt that there was any particular issue which ought to have been considered but was not considered, a finding could have been called for on that question or the order of remand

could be passed. That itself does not amount to laying down the land as to the obligation of the court to consider the issue of partial eviction in each and every case. In fact it will depend on the facts of the each case. Considering the decision of the Apex Court in Baba Kashinath Bhinge's case, it cannot be said that even though parties have been able to disclose that the tenant has alternative accommodation available for occupation, yet the issue of partial eviction will have to be considered by the trial court.

9. For the reasons stated above, therefore, there is no case made out for interference in the judgment and findings arrived at which is borne out from the record. Apart from that there is no case for interference in writ jurisdiction under Article 227 of the Constitution. Hence petition is rejected.

10. At this stage on the request by the learned advocate for the petitioner, the execution shall remain suspended till 31st May 2005 subject to the petitioner and/or any adult member of his family shall file an undertaking before the Registrar General of this court within a period of three weeks from today. The undertaking shall be to the effect that the petitioner or any adult members of his family shall not indulge

any third party right or interest in the premises nor will part with the possession and shall deliver peaceful vacant possession thereof to the respondent-landlord on or before 31st May 2005, and failing to submit the undertaking within the specified period, the order of suspension of eviction of decree passed today shall automatically vacated. The petition accordingly stands disposed of.

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